

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

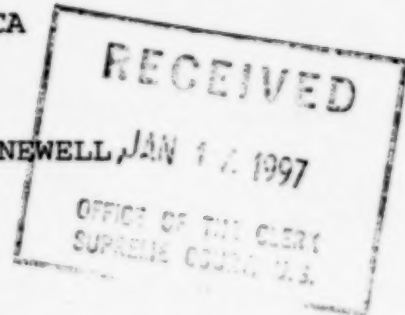
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No. 95-1726

UNITED STATES OF AMERICA

v.

GEORGE LABONTE, LAWRENCE HUNNEWELL, JAN 17 1997  
AND STEPHEN DYER



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ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION  
TO RESPONDENT DYER'S MOTION TO DISMISS THE WRIT  
AS IMPROVIDENTLY GRANTED

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The question presented by the petition for a writ of certiorari in this case is whether the Sentencing Commission's implementation of the Career Offender Guideline conflicts with the Commission's obligation under 28 U.S.C. 994(h) to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories" of career offenders. Section 994(h) provides that the Commission shall assure guidelines sentences "at or near" the statutory maximum for offenders convicted of specific offenses, including controlled substances offenses defined by 21 U.S.C. 841, but not including the offense of conspiracy to commit a controlled substance offense defined in 21

U.S.C. 846. The Commission has nevertheless provided that defendants convicted of drug conspiracy who satisfy the other requirements of the Career Offender Guideline are covered by that Guideline. See Guidelines § 4B1.2, Application Note 1 ("The terms 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

In a post-argument motion, respondent Stephen Dyer asserts for the first time that certiorari was improvidently granted as to him because he qualified as a career offender solely on the basis of his conviction for conspiracy to commit a controlled substance offense, in violation of 21 U.S.C. 846. Thus, he contends, because he is not in a category of defendants for whom Section 994(h) mandates a guidelines sentence "at or near" the statutory maximum, the Court's resolution of the issue in this case will have no effect on his sentence. Respondent's motion should be denied.

1. As an initial matter, respondent's contention is not properly raised at this time. Respondent did not raise this issue in the district court, and he concedes (Motion at 2 & n.1) that he did not raise it in the court of appeals or in opposition to the government's petition for certiorari. Nor did the court of appeals address respondent's current claim; rather, it upheld Amendment 506 on the basis that that amendment is consistent with Section 994(h). This Court will consider arguments in support of the lower court's judgment that were not advanced below "only in exceptional cases." Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39

(1989) (quoting Heckler v. Campbell, 461 U.S. 458, 468-469 n.12 (1983)); see also Ryder v. United States, 115 S. Ct. 2031, 2036 n.4 (1995); United States v. Alvarez-Sanchez, 511 U.S. 350, 360 n.5 (1994); Air Courier Conf. v. American Postal Workers Union, 498 U.S. 517, 522-523 (1991). Respondent has failed to identify any exceptional circumstance applicable to this case. Respondent sought a reduction in sentence when the Commission promulgated Guidelines Amendment 506. The government opposed respondent's request for resentencing solely on the ground that Amendment 506 is inconsistent with Section 994(h). Thus, respondent had every incentive in the district court and on appeal to claim that he did not fall within the scope of Section 994(h). See United States v. Lovasco, 431 U.S. 783, 788 n.7 (1977). His failure to make that argument below precludes him from raising it for the first time now.

2. Respondent's motion should also be denied because it rests on an erroneous premise. Respondent contends (Motion at 3-4) that his eligibility for a sentence reduction under Amendment 506 does not depend on this Court's resolution of the question presented in this case. That premise is incorrect, however, because the government's petition for certiorari seeks the invalidation of that amendment altogether, not as applied to specific cases. Thus, if the government prevails in this Court, the commentary to the Guidelines added by Amendment 506 will have no continuing legal force, and the basis on which respondent sought a reduction in sentence will no longer exist. The result will be that Guidelines



§ 4B1.1 will exist as it did before Amendment 506, i.e., that it will require that the sentence of a career offender be determined by using the maximum term authorized by statute for him, not the maximum term authorized for a defendant with no prior convictions. See U.S. Br. 5-6 (collecting cases).

Respondent asserts (Motion at 3-4) that, regardless of the Court's resolution of this case, "the district court had power under 18 U.S.C. § 3582(c) to resentence [him] on the basis of Amendment 506." That argument assumes, however, that if the Court ruled for the government, it would rewrite the language of Guidelines § 4B1.1, Application Note 2, to include only those career offenders not specified in Section 994(h). This Court ordinarily declines the task of rewriting statutes it finds invalid, see United States v. National Treasury Employees Union, 115 S. Ct. 1003, 1019 (1995), and respondent provides no reason to applying a different practice to the Sentencing Guidelines. Indeed, if the Court were to rule in the government's favor, it would be particularly inappropriate for the Court to rewrite the Career Offender Guideline to exempt persons in the position of respondent Dyer. In applying the Career Offender Guideline to defendants convicted of drug conspiracy offenses as well as to defendants convicted of substantive violations of 21 U.S.C. 841, the Commission's purpose was to avoid unwarranted sentencing disparities between similarly situated offenders. See Amendment 528 to the Guidelines (effective Nov. 1, 1995); see also S. Rep. No. 225, 98th Cong., 1st Sess. 176 (1983) (noting that Section

994(h) was not "necessarily intended to be an exhaustive list \* \* \* of types of cases in which the terms at or close to authorized maxima should be specified"); U.S. Reply Br. 6 n.5. It would defeat the Commission's purpose if the Career Offender Guideline were redrafted so as to specify different (and more lenient) treatment for drug conspiracy defendants who are to be sentenced as career offenders.

3. Finally, even if it were proper to consider severing applications of Amendment 506 to defendants described in Section 994(h) from other defendants and striking it down only as to the defendants specified in Section 994(h), Dyer's motion should be denied. Amendment 506 is explicitly premised on the view that "unwarranted" disparities arise from the variations in the exercise of prosecutorial discretion in the filing of notices of prior conviction under 21 U.S.C. 851. See U.S. Br. App. 36a (quoting Amendment 506) ("This rule avoids \* \* \* unwarranted disparity associated with variations in the exercise of prosecutorial discretion in seeking enhanced penalties based on prior convictions."). The Commission, however, does not have power to disagree with and effectively nullify the exercise of discretion that Congress has placed in the hands of federal prosecutors. Prosecutorial discretion is a legitimate and necessary aspect of criminal law enforcement, see United States v. Armstrong, 116 S. Ct. 1480, 1486 (1996); Wayte v. United States, 470 U.S. 598, 607 (1985), and the Sentencing Commission was not charged with eliminating its effects. Accordingly, such disparities as may flow

from a prosecutor's decision to file a Section 851 notice in one case but not another are not "unwarranted." Because the Commission's rationale for Amendment 506 conflicts with the discretion that Congress has placed in the hands of prosecutors through 21 U.S.C. 851, the application of that amendment is invalid even as to a person in respondent Dyer's position.

Respectfully submitted.

WALTER DELLINGER  
Acting Solicitor General

JANUARY 1997

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OCTOBER TERM, 1996

USA

Petitioner

vs.

GEORGE LABONTE, LAWRENCE HUNNEWELL,  
AND STEPHEN DYER

No. 95-1726

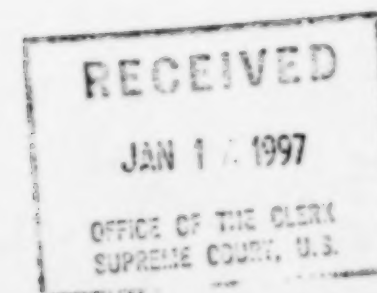
CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the **MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO RESPONDENT DYER'S MOTION TO DISMISS THE WRIT AS IMPROVIDENTLY GRANTED** by first class mail, postage prepaid, on this 14th day of January 1997.

*Walter Dellinger / us*  
WALTER DELLINGER  
Acting Solicitor General

January 14, 1997

See Attached List



January 14, 1997

Attachment List for Case No. 95-1726

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